

Sound Ethics In Health Care

Identifying the Patient's Authorized Surrogate: Close Friends as Surrogate Decision-Makers

Narrator: Welcome to Sound Ethics in Health Care, from the Department of Veterans Affairs National Center for Ethics in Health Care. Today's topic: When a "close friend" may serve as a patient's surrogate decision-maker.

Story narrator: Larry Roberts, a patient at a VA health care facility, was in the final stages of lung cancer. Alice Jergen, his closest friend, visited Larry every day. They often talked about his health care wishes, and Larry assumed that his doctors would let Alice make decisions about his medical treatment if he ever became incapacitated. But then Larry developed an infection with a high fever, and became confused. His doctors consulted his next of kin, his brother Frank, who lived in another state. Larry had never discussed his treatment wishes with his brother, and Frank and Alice disagreed about what treatment Larry should have. But because Alice was not related to Larry, and Larry had not legally selected her as his surrogate decision-maker, the doctors let Frank make the decisions.

Narrator: The surrogate decision-maker is the person authorized to make health care decisions on behalf of a patient who no longer has decision-making capacity. In most non-Federal facilities, the priority of surrogates is determined by state law. Samantha Twigg is a Management Analyst in the Management Review Service in the VA Office of the Principal Deputy Under Secretary for Health, a licensed clinical social worker, and a former Ethics Policy Specialist at the National Center for Ethics in Health Care. She reminds us that in VA, the surrogate hierarchy is determined by federal regulations, as outlined in [VHA Handbook 1004.01](#), Informed Consent for Clinical Treatments and Procedures.

Twigg: The health care agent is first. A health care agent is the person selected by the patient when they have decision-making capacity, who is then named in a durable power of attorney to make health care decisions for the patient if, or when, that patient can no longer make decisions for themselves. Then there's legal or special guardian – which is someone who's appointed by the court. The third level is next-of-kin, and that is a relative, 18 years of age or older.

Narrator: The category of next of kin has its own priority list: spouse, followed by child, parent, sibling, grandparent, and finally, grandchild.

Twigg: And back to the priority of surrogates, for the fourth level, close friend. A “close friend” is considered any person who is 18 years of age and older who has shown care and concern for the patient’s welfare, and is familiar with the patient’s usual activities, their health and religious beliefs, and their values.

Narrator: There are several circumstances in which a close friend could become a patient’s surrogate decision-maker. It can happen when there is simply no one else — when the patient has not named a health care agent, and has no legal guardian or next of kin, but does have a close friend who is willing to act as a surrogate. Another situation is one in which the patient decides to name a close friend as surrogate.

Twigg: Some patients, for example, have no close family members or are estranged from their family members. Some patients even disagree with the beliefs of their family members, and so they might be concerned that when the time comes, their family wouldn’t honor their wishes. In VA, a common law spouse would be categorized at the lowest level in the priority of surrogates – at the level of close friend. But the patient can make sure their preferred surrogate, such as a common law spouse, or a neighbor, is at the top of the priority of surrogates by appointing that person as their health care agent in a durable power of attorney for health care.

Narrator: In June 2013, the United States Supreme Court ruled that the Defense of Marriage Act was unconstitutional. As a result of that decision, VA is now able to treat all married individuals equally as legally recognized spouses, regardless of gender.

Twigg: In the past, we advised same sex couples including same sex spouses to prepare a durable power of attorney for health care, to ensure that they would be prioritized higher than close friend. While this is still true for unmarried same sex couples, married same sex spouses will now be prioritized at the top of the next of kin hierarchy as a spouse. In keeping with patient-centered care and equal treatment of all Veterans, VA personnel should treat a Veteran’s same-sex spouse just as they would an opposite-sex spouse. For example, by not requiring a marriage license -- unless there is evidence to suggest that the person is not the spouse.

Narrator: In VA, a patient can appoint a health care agent by using [VA Form 10-0137](#), the VA advance directive, which is both a living will and a durable power of attorney for health care. In cases where the patient no longer has decision-making capacity, the practitioner, with the assistance of other staff, must make a

reasonable inquiry as to the availability of other possible surrogates, in accordance with the priority of surrogates.

Twigg: Each facility must have a procedure in place to identify potential surrogates, including examining personal effects, checking the health record or any other VA records that might be out there, such as benefits or pension records, to see if there is anyone who they could reach out to who would be willing to serve in this role. Then if a surrogate is identified, a close friend for example, an attempt to contact that person by telephone needs to be made within 24 hours of determining that the patient in fact can't make decisions for themselves.

Narrator: There are specific documentation requirements that must be followed in order to establish a close friend as the surrogate.

Sam: In order to serve as surrogate, the close friend must provide a signed, written statement with their signature on it to be entered into the patient's electronic health record. So it actually becomes part of the health record. The statement must provide specific examples regarding that person's relationship to the patient. And then social workers, or other designated staff, have to verify that this person has in fact met the requirement by creating a progress note and signing it into the health record.

Narrator: For links to documents mentioned in this podcast, visit www.ethics.va.gov/soundethics_podcasts.asp. If you have a topic that you would like to see presented in a podcast, send an email to vhaethics@va.gov. Sound Ethics in Health Care is brought to you by the Department of Veterans Affairs National Center for Ethics in Health Care.